

STATE OF MICHIGAN
COURT OF APPEALS

SANDRA L. HUZAR,

Plaintiff/Counter-Defendant-
Appellee,

v

MICHAEL W. HUZAR,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED
February 21, 2003

No. 236080
Wayne Circuit Court
LC No. 01-110144-DO

Before: O'Connell, P.J., and Fitzgerald and Murray, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce and a prior order imposing sanctions. We affirm the judgment of divorce, vacate the order imposing sanctions, and remand for further proceedings.

Plaintiff filed a complaint for divorce from defendant and defendant filed a counter complaint. Trial was scheduled for June 21, 2001. On May 1, 2001, plaintiff served defendant with interrogatories. On June 5, 2001, plaintiff filed a motion to compel answers to interrogatories and for attorney fees. A hearing on the motion was scheduled for June 15, 2001.

Defendant's deposition was scheduled to be taken at 2:00 p.m. on June 14, 2001. On June 13, 2001, defendant's counsel contacted plaintiff's counsel and requested that the deposition be adjourned for the reason that defendant could not secure time off from work. Plaintiff's counsel informed defendant's counsel that the deposition could not be adjourned. On the morning of June 14, 2001, defendant's counsel again informed plaintiff's counsel that defendant could not appear for the deposition. Plaintiff's counsel and a court reporter appeared for the deposition at the appointed time and place; defendant did not appear.

On June 15, 2001, plaintiff filed an emergency motion seeking entry of a default against defendant based on his failure to cooperate with discovery, and sanctions in the amount of \$1,645 (\$45 for the court reporter and attorney fees of \$1,600 [eight hours at \$200 per hour]) for defendant's failure to appear at the deposition. Defendant's counsel was served with the motion when he appeared for argument on plaintiff's prior motion to compel answers to interrogatories and for attorney fees. At the hearing plaintiff's counsel requested \$2,000 in attorney fees based on defendant's failures to answer the interrogatories and appear for the deposition. Plaintiff's

counsel acknowledged that she received notice that defendant would not appear, but indicated that she had booked the entire day to prepare for and take the deposition. The trial court denied the motion to compel answers to interrogatories, and awarded plaintiff's counsel attorney fees in the amount of \$2,000. The court gave no reason for awarding sanctions in that amount.

Plaintiff submitted an order for entry under the seven-day rule. MCR 2.603(B)(3). Defendant objected to the order on the ground that it awarded plaintiff's counsel fees in the amount of \$2,000 when counsel prayed for fees in the amount of \$1,645. Plaintiff moved for entry of the order. The trial court held a hearing and granted the motion without explanation.¹

Pursuant to MCR 2.313(D)(1)(a), if a party fails to appear for a scheduled deposition, the trial court "may order such sanctions as are just." In lieu of or in addition to an order imposing sanctions, a trial court may order the party failing to act to pay the reasonable expenses, including attorney fees, caused by the failure unless the court finds that the failure was substantially justified or that the circumstances make such an award unjust. MCR 2.313(D)(2). Prior to imposing a discovery sanction, the trial court should consider various factors, including whether the violation was willful or accidental, the party's history of failing to comply with discovery requests, the prejudice to the other party, actual notice to the other party, and any attempts made to cure the failure. See *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). We review the trial court's decision to impose a discovery sanction for an abuse of discretion. *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999).

When attorney fees are awarded, the amount awarded is for reasonable fees, which may or may not be the same as the amount requested. If the reasonableness of a request for fees is challenged, the trial court generally must conduct an evidentiary hearing. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999). In determining whether attorney fees are reasonable, the trial court must consider such factors as: (1) the professional standing and experience of the attorney; (2) the skill, time, and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. *Papo v Aglo Restaurants*, 149 Mich App 285, 299; 386 NW2d 177 (1986). The burden of proof as to the reasonableness of the fees requested rests with the party claiming compensation. *In re Krueger Estate*, 176 Mich App 241, 249; 438 NW2d 898 (1989). We review the trial court's findings of fact underlying an award of attorney fees for clear error, *Solution Source, Inc v LPR Assocs Ltd P'ship*, 252 Mich App 368, 381; 652 NW2d 474 (2002), and review the award for an abuse of discretion. *Citizens Ins Co v Juno Lighting, Inc*, 247 Mich App 236, 245; 635 NW2d 379 (2001).

We affirm the judgment of divorce;² however, we vacate the trial court's order awarding plaintiff sanctions in the amount of \$2,000, and remand this matter to the trial court for an evidentiary hearing on plaintiff's motion requesting sanctions for defendant's failure to appear for the scheduled deposition, and the reasonableness of the sanctions requested. The trial court

¹ Defendant filed a claim of appeal on August 9, 2001. On December 10, 2001 another panel of this Court entered an order granting defendant's motion for bond pending appeal.

² Defendant does not challenge any specific provision of the judgment on appeal.

did not consider the relevant factors before imposing a discovery sanction, *Dean, supra*, and did not state its reasons for its decision on the record. We are unable to determine if the trial court abused its discretion when it concluded that sanctions were warranted. *Bass, supra*. The trial court was authorized to award reasonable expenses, including attorney fees, as a sanction for defendant's failure to appear for a scheduled deposition. MCR 2.313(D)(1)(a) and (2). Defendant objected to the reasonableness of plaintiff's request for attorney fees; however, the trial court did not hold an evidentiary hearing or consider the relevant factors before awarding fees in the amount of \$2,000. *Papo, supra*. The trial court did not state its reasons for granting fees in the amount of \$2,000 on the record; therefore, we are unable to determine if the trial court's findings of fact underlying the award were clearly erroneous, *Solution Source, supra*, or if the trial court abused its discretion by awarding attorney fees. *Citizens Ins Co, supra*. An evidentiary hearing is necessary under the circumstances. *Papo, supra*.

The judgment of divorce is affirmed, the order imposing discovery sanctions is vacated, and this case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray